**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |
| | ) | |
| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Deployment of Wireless Services Offering Advanced Telecommunications Capability | ) | CC Docket No. 98-147 |

# JOINT OPPOSITION TO THE CHOICE COALITION'S PETITION FOR STAY


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**JOINT OPPOSITION**
**TO THE CHOICE COALITION'S PETITION FOR STAY**

Pursuant to Section 1.45(d) of the Commission's rules, 47 C.F.R. § 1.45(d), BellSouth Telecommunications, Inc., Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association, and the Verizon telephone companies hereby oppose the "Emergency Joint Petition for Stay by the Choice Coalition," filed August 27, 2003.

## INTRODUCTION AND SUMMARY

In its petition, the "Choice Coalition" purports to ask the Commission "to stay a limited portion" of the Commission's Triennial Review Order ("*Order*"). Pet. at 1. In fact, the petition seeks to have the Commission *impose* anew a line-sharing obligation that "was unequivocally vacated by the D.C. Circuit" (*Order* ¶ 263 n.782) and that the Commission has concluded would be unlawful. Staying the effectiveness of the *Order* would not restore incumbent LECs' obligation to engage in line sharing. To the contrary, because the Commission's original line-sharing rules were vacated by the court in *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003), the only regulatory obligation that incumbent LECs have to add new line-sharing customers (or to maintain existing ones) is imposed by the transition rules adopted in the *Order*. If the Commission were to stay those transitional line-sharing rules, then incumbents would have no obligation under the Commission's rules to engage in any form of line sharing. The Commission thus cannot grant the relief that the Coalition requests, let alone through the inappropriate procedural vehicle of a "stay." Nor can the Commission "stay" the obligation under the transition rules for requesting carriers to pay 25% of the cost of an unbundled loop for new line-sharing customers during the first year after the rules go into effect. The transitional rules require incumbents to provision new line-sharing orders *only* at the price mandated by the Commission; to require incumbents to provision new line-sharing orders at pre-existing prices would be to restore the line-sharing rule that the D.C. Circuit – and the Commission itself – rejected, thereby flouting the court's mandate and upsetting the substantive determination made in the *Order*.

Even if that procedural point were not dispositive – and it is – the Coalition cannot satisfy the requirements for a stay. First, the Coalition cannot show any likelihood of success on the merits of its challenge because the Commission's determination that the costs of requiring the unbundling of the high-frequency portion of the local loop outweigh any alleged benefit was consistent with – indeed, effectively compelled by – the D.C. Circuit's decision in *USTA v. FCC*. Most important, the Commission found that the existence of intermodal competition from cable and other network platforms means that "competition in the broadband market" is not – to put it mildly – "heavily dependent" on line sharing. *Order* ¶ 263. The Commission could not impose the costs of unbundling when there would be no significant benefit to broadband competition. Moreover, the Commission properly determined that requiring the unbundling of the whole loop – particularly in light of competitive carriers' opportunity to engage in line splitting – "creates better competitive incentives." *Id.* ¶ 260. "[R]ules requiring line sharing may skew competitive LECs' incentives" and "discourage innovative arrangements between voice and data competitive LECs and greater product differentiation." *Id.* ¶ 261. And requiring line sharing creates significant administrative problems, because of the difficulties of allocating costs among services. *Id.* ¶ 260 & n.772. The D.C. Circuit made clear that the Commission could not order unbundling under these circumstances.

The Coalition further fails to satisfy the requirements for a stay because its claim of imminent harm is unsupported and because re-imposing line sharing would threaten grave harm to incumbent LECs and the public interest. Far from harming the Coalition's members, the Commission's unduly generous transitional rules provide data-only CLECs with benefits to which they are not entitled under the Act: they receive free line sharing for existing customers, and they are permitted to add new customers at a fraction of the cost of an unbundled loop, perpetuating an unlawful windfall. Indeed, the largest member of the Coalition – Covad – has publicly boasted that the *Order* is "'a net positive for us.'" Yochi J. Dreazen, *FCC to Unveil Contentious Phone-Network Rules*, Wall St. J., Aug. 21, 2003, at B4. Granting the Coalition's request that the Commission go even further and require incumbent LECs to provision new orders indefinitely and "at a price of roughly zero" (*Order* ¶ 260) would inflict irreparable injury on incumbent LECs and harm the public interest by inhibiting competition in the broadband market.

The Commission should therefore deny the Coalition's petition.

## ARGUMENT

The Coalition's stay request does not provide an appropriate vehicle for the relief it requests. Even if the petition were not procedurally improper, moreover, the Coalition cannot remotely satisfy the requirements for a stay. In evaluating a request for a stay pending judicial review, the Commission employs the familiar test set out in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam), pursuant to which the Commission balances (1) the likelihood of success on the merits, (2) whether petitioners will suffer irreparable injury absent a stay, and (3) the effect of a stay on other parties and the public interest. *See, e.g.*, Order, *Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, 17 FCC Rcd 19746, ¶ 12 (2002); *see also Washington Metro.*

*Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). The Coalition's arguments with respect to each of these factors fail to justify a stay.

## I. THE COMMISSION CANNOT REINSTATE THE VACATED LINE-SHARING RULES UNDER THE GUISE OF A "STAY"

In its petition, the Coalition states that its seeks a limited stay of the *Order* "to the extent that its application would (1) immediately increase any existing . . . rates for requesting telecommunications carriers to access the high-frequency portion of the loop" and "(2) prevent requesting telecommunications carriers from purchasing access to the high-frequency portion of the loop for new customers after the first year." Pet. at 1. The Coalition's request, however, is based on a fundamental misconception: the Coalition apparently believes that it was the *Order* that eliminated incumbents' obligation to engage in line sharing, but that is incorrect. To the contrary, prior to the enactment of the *Order*, the *D.C. Circuit* had vacated the Commission's pre-existing line-sharing rules in *USTA v. FCC*. Although the D.C. Circuit stayed its mandate and thus delayed the vacatur of those rules until February 27, 2003, the D.C. Circuit's mandate has issued and certiorari has been denied. Thus, it was the decision in *USTA* – not the *Order* – that eliminated incumbents' prior obligation under federal law to engage in line sharing. If the transitional rules in the *Order* are stayed, the FCC cannot create new ones without going through a new rulemaking.

To be sure, under appropriate circumstances, the Commission has the authority to stay the effectiveness of its orders. But because it was not the *Order* that eliminated incumbents' obligation to unbundle the high-frequency portion of the local loop – rather, the court's decision in *USTA* eliminated that obligation – staying the effectiveness of the *Order* would not restore the previous rules. Incumbents have an obligation to engage in line sharing only to the extent such an obligation is imposed by the transitional rules contained in the *Order*. If the Commission were to stay the effectiveness of the transitional line-sharing rules, incumbents would have no obligation under the Commission's rules to engage in line sharing at all.

Because the Coalition actually seeks to have the Commission impose anew an obligation that was eliminated by the court's decision in *USTA*, the Commission cannot grant the requested relief through the mechanism of a stay of any portion of the *Order*. Nor can the Commission simply restore its prior rules pending judicial review. The court deliberately ordered that the Commission's prior line-sharing rules be vacated, not left in place pending remand; in asking the Commission simply to restore the rules as an interim measure, the Coalition asks the Commission to flout the court's mandate. Moreover, in the *Order*, the Commission found that it could not order the unbundling of the high-frequency portion of the loop under the standards in 47 U.S.C. § 251(d)(2) or the court's decision in *USTA*. Thus, contrary to the Coalition's statements, the stay request asks the Commission to reverse a core determination reached in the *Order* by adopting a rule that is directly at odds with the determination the Commission actually made. *Cf.* Pet. at 6 (claiming that the requested relief "will not disturb the underlying conclusions reached by the Commission related to line sharing"). The Commission cannot reverse a determination made after full notice-and-comment rulemaking and adopt a contrary rule in response to a request for stay.

Nor can the Commission eliminate the requirement that requesting carriers pay 25% of the cost of the loop for new line-sharing orders during the first year. Again, in the absence of a transitional rule, the Commission's rules would impose no obligation on incumbents to provision new line-sharing orders at all. The *Order* requires incumbents to provision such new orders during the first year of the transition *only* on the condition that requesting carriers pay 25% of monthly recurring loop charge for access to the loop. *See Order*, App. B at 9

(§ 51.319(a)(1)(i)(B)). The Commission did not simply order that incumbents provision new orders for free, nor could it have done so in light of its determination that it could not require the unbundling of the high-frequency portion of the loop under the Telecommunications Act of 1996 ("1996 Act"). Elimination of the requirement that requesting carriers pay some fraction of the loop cost for new line-sharing orders would amount to restoration of the rule that the D.C. Circuit deliberately vacated, and a reversal of the Commission's determination that it could not justify requiring incumbent LECs to continue to unbundle the high-frequency portion of the local loop *except* as a transitional measure. Requesting carriers can gain access to new line-sharing arrangements by paying the charge required under the Commission's rules, or not at all.

## II. THE COALITION CANNOT DEMONSTRATE ANY LIKELIHOOD OF SUCCESS ON THE MERITS

The Coalition's threatened challenge to the Commission's determination not to require incumbents to provide unbundled access to the high-frequency portion of the local loop is plainly without merit in light of the D.C. Circuit's decision in *USTA*. In its decision in *USTA*, the court of appeals determined that the Commission's prior decision to require incumbent LECs to unbundle the high-frequency portion of the loop was fatally undermined by the Commission's "naked disregard of the competitive context." 290 F.3d at 429. As the court found, "mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource." *Id.* In ordering incumbents to engage in line sharing, the Commission had simply ignored the fact that cable modem service is the leading broadband product (with other competitive alternatives available); in light of that, the Commission had no valid reason to believe that ordering line sharing "would bring on a significant enhancement of competition." *Id.* In vacating those line-sharing rules, the court admonished the Commission to reconsider the issue in light of the competitive context and the other considerations identified elsewhere in the court's opinion. *Id.*

The Commission's core determination that it would "decline" to "make available the high frequency portion of the copper loop" (*Order* ¶ 255) was fairly compelled by the court's holding and the evidence in the record. Most important, the Commission acknowledged that the D.C. Circuit had expressly ordered the Commission "to consider the relevance of broadband competition coming from cable and, to a lesser extent, satellite providers." *Id.* ¶ 262. The Commission noted that, "nationally, cable modem service is the most widely used means by which the mass market obtains broadband service" and that "the gap between cable modem and ADSL subscribership continues to widen." *Id.* In light of this, the Commission could not find that there would be any competitive benefit to ordering line sharing: "the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon" line sharing. *Id.* ¶ 263. Accordingly, "the costs of [line sharing] outweigh the benefits"; indeed, it is *refusing* to require line sharing that "will encourage the deployment of new technologies." *Id.*

Moreover, after noting that in its *Line Sharing Order*[1] the Commission had found that competitive LECs would be impaired without access to line sharing, the Commission reversed that determination for two key reasons. First, the Commission found that it was inappropriate to "focus . . . only on the revenues derived from an individual service" rather than "all potential

[1] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

revenues derived from using the full functionality of the loop." *Order* ¶ 258. Competitive LECs are not impaired if they have access to the stand-alone loop because any increased costs "are offset by the increased revenue opportunities afforded by the whole loop" – including voice, voice over DSL, and video services. *Id.* Second, the Commission determined that "we can no longer find that competitive LECs are unable to obtain the [high-frequency portion of the loop] from other competitive LECs through line splitting," noting that Coalition-member Covad had just announced plans "to offer ADSL service to 'more of AT&T's 50 million consumer customers' " through such arrangements. *Id.* ¶ 259.

The Commission also found that requiring incumbents to provide access to the whole loop "creates better competitive incentives" than requiring separate unbundling of the high-frequency portion of the loop. *Id.* ¶ 260. As an initial matter, pricing the high-frequency portion of the loop creates significant administrative problems because "there is no single correct method for allocating loop costs." *Id.* If requesting carriers are permitted to engage in line sharing "at a price of roughly zero" (as under the vacated rules), they gain "an irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs." *Id.* Thus, the Commission rejected its earlier finding that " 'line sharing will level the competitive playing field.' " *Id.* ¶ 261 (quoting *Line Sharing Order* ¶ 35). Just as important, the Commission found that requiring line sharing threatens innovation and investment in new technology by "skew[ing] competitive LECs' incentives toward providing a broadband-only service to mass market consumers, rather than . . . a bundled voice and xDSL service offering." *Id.* The Commission concluded that "readopting our line sharing rules . . . would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings." *Id.* "[S]uch results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." *Id.*

In challenging these conclusions, the Coalition argues that the Commission failed to justify its conclusion that requesting carriers are not impaired without access to line sharing, particularly in light of alleged operational difficulties with line splitting; that the Commission failed properly to evaluate evidence of the competitive importance of line sharing; and that the Commission failed to give adequate notice of its intent to eliminate the line-sharing requirement. The Coalition further argues that the Commission failed to give effect to the analysis mandated by *USTA*. None of the Coalition's arguments is persuasive.

### A. The Commission Amply Explained Its Departure from the Findings in the *Line Sharing Order*

The Coalition's emphasis on its claim that the Commission failed to explain its departure from the conclusions it reached in the *Line Sharing Order* is paradoxical. The *Line Sharing Order* was vacated by the D.C. Circuit. The Commission's refusal to adhere to a conclusion that had already been held *unlawful* hardly requires special explanation. Indeed, the D.C. Circuit made clear that the Commission could not order line sharing unless it found that there would be a significant benefit to competition *in the broadband market.* Given the Commission's finding that intermodal competition – particularly from cable modem providers – ensures vigorous broadband competition, the Commission plainly could not find that the impairment standard of section 251(d)(2) was met.

In any event, the Commission did carefully explain the basis for its subsidiary conclusions – contrary to its determination in the *Line Sharing Order* – that competitive LECs are not impaired without access to line sharing both because impairment must be judged based on the "full functionality of the loop" and because of the availability of line splitting.

The Coalition argues that the Commission could not "seriously consider" voice services provided over DSL lines and other innovative services because those technologies do not have "significant market penetration levels." Pet. at 14.[2] But the Commission did appropriately consider requesting carriers' revenue *opportunities* afforded by the "full functionality of the loop," because the Commission's impairment analysis cannot depend on whether "carriers that pursue a particular business strategy are impaired without access to UNEs." *Order* ¶ 115. The Coalition members claim they are impaired simply because their business plans "call for greater reliance" on line sharing. *Id.* But the Commission's impairment analysis is based on the availability of revenues from a "*full range of services*" that can be provided using a particular network element. *Id.* n.396 (emphasis added). In light of the undisputed ability of broadband providers to develop additional services, the Coalition's argument collapses.[3]

The Coalition also challenges the Commission's conclusion that line splitting provides a viable alternative for broadband providers who do not wish to provide voice service. Pet. at 19. But the Commission reached this conclusion in light of Covad's own public statements that line splitting provides a viable commercial strategy. *See Order* ¶ 259 & n.767 (finding that "Covad's argument that . . . there are no third-party alternatives to" line sharing was not "credible"). Indeed, Covad has continued to tout line-splitting arrangements it has reached with a variety of

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[2] Because of the availability of these technologies, broadband providers are not required to provide circuit-switched voice service in order to enter the voice market. *Cf.* Pet. at 16-18.

[3] The Coalition's claim that the Commission's line-sharing decision "contradicts its unbundling analysis for other UNEs" (Pet. at 14) is wrong. The Commission found that requesting carriers would be impaired without access to the local loop *no matter* whether they seek to provide narrowband services, broadband services, *or both* – it did not find impairment solely for carriers that restrict the types of service they offer over the loop.

carriers as allowing Covad to " 'stay in the consumer business.' "[4] In announcing one recent line-splitting deal, Covad stated that such arrangements " 'demonstrate[] our continued execution of our business strategy to sign up both national and regional line-splitting partners and capitalize on the growing demand for bundled voice and data services.' "[5] Covad insisted that " '[i]t's not that we've artificially created this market to escape the FCC' . . . . 'We're taking advantage of an already existing market.' "[6] Covad declared that it is " 'in a unique position *to continue driving increased DSL adoption throughout the United States*' " because of the availability of line splitting.[7] Moreover, Covad stock is trading at a much higher level today than it was a year ago, when line-sharing rules were still in place, with one analyst calling Covad's line-splitting arrangements an " 'increasingly strong distribution channel.' "[8]

The Coalition offers two arguments to the contrary. First, it argues that competing DSL providers will no longer be able to sell their services to customers who prefer to purchase their voice service from an incumbent, thus "relegat[ing] them to providing data services to a miniscule fraction of the potential market they can serve . . . using line sharing." Pet. at 21. But the *potential* market open to competing broadband providers using line splitting (and stand-alone loops) is the same as the potential market using line sharing – any customer wishing to purchase

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[4] *See* Paul Davidson, *AT&T Will Bundle Broadband with Phone Service Plan to Rival Regional Bells'*, USA Today, July 30, 2003, at B3 (quoting CEO Charles Hoffman); *see also* Reuters, *MCI and Covad Sign Voice/Data Bundling Deal*, Sept. 2, 2003.

[5] Press Release, *VarTec and Excel Select Covad DSL for Their Local/Long Distance Voice and Data Bundles*, Aug. 28, 2003.

[6] Kevin Fitchard, *Covad Signs Line-Splitting Deal with Z-Tel*, TelephonyOnline.com, Aug. 7, 2003.

[7] TR Daily, Sept. 2, 2003 (emphasis added).

[8] Communications Daily, Aug. 29, 2003, at 6.

broadband service. The only thing that has changed is that broadband providers will no longer be permitted to offer their service as an add-on to incumbents' voice services in the absence of a voluntary commercial arrangement that is acceptable to both parties. The absence of line sharing puts broadband providers at no disadvantage. There is no legitimate definition of impairment that could include a competitor's inability to enter into a joint marketing arrangement with an unwilling partner.

Second, the Coalition argues that line splitting is not yet operationally available as a substitute to line sharing. Pet. at 30. This claim flatly contradicts Coalition-member Covad's public statements, in which it has argued that it will continue to serve the consumer market through line splitting and in which it has told its investors that line splitting represents a viable business strategy. *See supra* nn.4-7. In any event, none of the complaints that the Coalition raises concerning incumbents' OSSs for line splitting gives any reason to question the Commission's basic conclusion that the availability of line splitting permits broadband providers to enter the market without independently developing a circuit-switched voice capability – even if they cannot efficiently utilize the stand-alone loop. It may be that "the need for line splitting is likely to grow" (*Order* ¶ 259 n.771) and that, as a result, carriers will engage in collaborative efforts to develop new and improved OSSs as needed. *See id.* ¶ 252 & n.752. But precisely because the Commission's unbundling rules permit line splitting and have required LECs "to implement, in a timely fashion, practical and reasonable measures to enable competitive LECs to line split" (*id.* n.752 (internal quotation marks omitted)), the Coalition's complaints about line-splitting implementation cannot undermine the Commission's finding of non-impairment.

Moreover, there is simply no evidence in the record to support the Coalition's claims that line splitting has not been effectively implemented to date, much less that such implementation is so technically daunting that it *cannot* be implemented. Indeed, to the extent they have addressed this issue, all of the Commission's 271 orders have expressly found that incumbents have complied with their obligation to allow line splitting.[9] If competitors had legitimate complaints on this point, they surely would have raised them in those proceedings or on the record in this proceeding; their decision to do so only in a post-hoc petition for stay undermines the plausibility of their claims.

### B. The Commission Properly Evaluated the Competitive Insignificance of Line Sharing

The Coalition also challenges the Commission's determination that line sharing is without competitive significance in light of the existence of intermodal competition – and the leading position of cable modem service providers – in the broadband market. But the Coalition's claims that "the primary factor driving the deployment of ADSL services . . . has been the Commission's line sharing rules" (Pet. at 23) and that only line sharing will permit "DSL deployment . . . to overtake [sic] market share from cable modem deployment" (*id.* at 25) are without support in the record or otherwise.

[9] *See, e.g.*, *Qwest Minnesota Order*, 18 FCC Rcd 13323, ¶ 53 (2003); *Qwest New Mexico/Oregon/South Dakota Order*, 18 FCC Rcd 7325, ¶ 93 (2003); *SBC Nevada Order*, 18 FCC Rcd 7196, ¶ 65 (2003); *Verizon Maryland/D.C./West Virginia Order*, 18 FCC Rcd 5212, ¶ 119 (2003); *Qwest Nine State Order*, 17 FCC Rcd 26303, ¶ 355 (2002); *SBC California Order*, 17 FCC Rcd 25650, ¶ 132 (2002); *BellSouth Florida/Tennessee Order*, 17 FCC Rcd 25828, ¶ 132 (2002); *Verizon Virginia Order*, 17 FCC Rcd 21880, ¶ 138 (2002); *Verizon New Hampshire/Delaware Order*, 17 FCC Rcd 18660, ¶ 105 (2002); *BellSouth Five State Order*, 17 FCC Rcd 17595, ¶¶ 164, 232 (2002); *id.* ¶ 251 ("competitive LECs have raised no complaints" about BellSouth's line-splitting OSS); *Verizon New Jersey Order*, 17 FCC Rcd 12275, ¶¶ 135 (2002) ("Verizon's ordering process for line splitting in New Jersey allows efficient competitors a meaningful opportunity to compete"), 153; *Verizon Maine Order*, 17 FCC Rcd 11659, ¶ 51 (2002); *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd 9018, ¶ 243 (2002); *Verizon Vermont Order*, 17 FCC Rcd 7625, ¶ 55 (2002), *appeal dismissed*, *AT&T Corp. v. FCC*, No. 02-1152, 2002 WL 31619058 (D.C. Cir. Nov. 19, 2002); *Verizon Rhode Island Order*, 17 FCC Rcd 3300, ¶ 90 (2002); *SBC Arkansas/Missouri Order*, 16 FCC Rcd 20719, ¶ 106 (2001), *aff'd*, *AT&T Corp. v. FCC*, No. 01-1511, 2002 WL 31558095 (D.C. Cir. Nov. 18, 2002) (per curiam); *Verizon Pennsylvania Order*, 16 FCC Rcd 17419, ¶ 89 (2001), *aff'd*, *Z-Tel Communications, Inc. v. FCC*, 333 F.3d 262 (D.C. Cir. 2003).

First, there are no data to support the claim that the significant increase in ADSL deployment is due to the availability of line sharing. To the contrary, incumbent LECs account for the lion's share of additional ADSL deployment, and analysts have widely and correctly concluded that incumbent LECs view their primary competition for broadband customers as cable modem providers, not competitive DLECs.[10] Indeed, there is no statement by any independent analyst cited in the Coalition's papers that suggests that the implementation of line sharing did anything to drive DSL deployment by incumbent LECs. Second, both the claim that DSL has begun to "overtake" cable modem and the claim that line sharing has anything to do with any relative success DSL has had are baseless. First, the numbers that Covad itself cites show cable modem's lead over DSL service widening substantially, with ADSL lines increasing by 105% in 2002 and cable modem connections increasing by 90% on a much larger base. *See Order* ¶ 262. Moreover, while incumbent LECs are pricing DSL service extremely aggressively, that pricing strategy is driven by competition from *cable modem*, not competitive DSL providers.[11] Indeed, the announcement that line sharing would be eliminated was followed by announcements of more aggressive price competition, not less.[12] In light of this, the

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[10] *See, e.g.*, Ex Parte Letter from Susanne Geyer, Verizon, to Marlene H. Dortch, FCC, at 2 (May 19, 2003) (line sharing accounts for substantially less than 1% of the broadband market); M. Epelbaum, *et al.*, Morgan Stanley, Investext Rpt. No. 7109317, *Telecom Services – Wireline – The December Connection – Industry Report* at *4 (Dec. 2, 2002) ("US competition between DSL and cable modems probably accelerates Internet dial-up migration to broadband. . . . Bells face serious competition in the Internet-access marketplace from cable competitors.").

[11] *See, e.g.*, S. Levy, *et al.*, Lehman Brothers, Investext Rpt. No. 7398937, *Spenders & Vendors – Steady as She Goes: March Quarter Spending – Industry Report* at *10 (May 19, 2003) ("[w]e also see discounting in the DSL space (e.g., Verizon recently reduced its monthly DSL pricing for new customers . . . ), which is an attempt to battle against the dominant cable modem service").

[12] Almar Latour & Peter Grant, *Verizon May Set Off Price War*, Wall St. J., May 5, 2003, at B2.

Commission's determination that intermodal competition – not competition from competitive DSL providers – is the most significant competitive factor in the broadband market is unassailable. And, as discussed further below, that finding – even without more – fully justifies the Commission's decision not to require line sharing. Indeed, precisely because providers of broadband service have proven alternative platforms available, it would be contrary to the holding in *USTA* to require line sharing when such a requirement could not provide any significant competitive benefit. *See infra* at II.D.

### C. The Claim that the Coalition Lacked Adequate Notice Is Frivolous

The Coalition's claim that the Commission failed to give notice that it "contemplated adopting . . . sweeping changes to its line sharing rules" (Pet. at 27) hardly merits a response.[13] Not only did the Commission's original notice explicitly call attention to the possibility that the Commission might eliminate line sharing, *see* Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781, ¶ 53 (2001), but also, well before the Commission ruled in this proceeding, the D.C. Circuit *vacated* the Commission's prior line-sharing rules. Thus, no party could have been in any doubt that "sweeping changes to [the] line sharing rules" would be required. Moreover, Covad and others extensively addressed the merits of retaining (or, after *USTA* was decided, re-imposing) the line-sharing obligation. *See, e.g.*, Covad Comments at 34-45, CC Docket Nos. 01-338 *et al.* (FCC filed Apr. 5, 2002); *see also* Public Notice, *Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings*, 17 FCC Rcd 10512

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[13] Likewise, the Coalition itself concedes that its complaints about the "Commission decision-making process" are not "germane to [its] stay request." Pet. at 26. Because the Commission's decision not to require line sharing is amply justified in the *Order*, the Coalition's concerns about political horse-trading provide no basis for overturning the Commission's determination.

(2002) (providing parties additional time to file reply comments "to incorporate their review and analysis" of *USTA*). All parties knew what was at stake.

As for the Coalition's complaints that it had inadequate opportunity to comment on the transitional rules, the fact is – as the Coalition concedes – that Covad submitted extensive comments concerning a proposed transition. Moreover, given that all parties knew that *USTA* mandated the vacatur of existing line-sharing rules, and that such rules might well not be re-imposed, other parties could have submitted, as some did, comments on an appropriate transitional regime before the *Order* was issued. *See Order* ¶ 264 n.785. In any event, the Coalition does not complain about the transitional rules; it complains about the decision not to re-impose the line-sharing obligation. As part of its stay request, it can of course seek a stay of the transitional rules, but such a stay would simply eliminate incumbents' obligation to engage in any form of line sharing.

### D. The Commission's Refusal To Re-Impose Line Sharing Is Consistent with *USTA*

The Coalition's claim that the Commission failed to undertake the analysis mandated by the court in *USTA* betrays the Coalition's fundamental misunderstanding of that decision. The lynchpin of the court's decision to vacate the prior line-sharing rules was its determination that the Commission had failed to consider the competitive context in requiring carriers to engage in line sharing. The court noted that *any* unbundling requirement "imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." 290 F.3d at 427; *see id.* at 429. In a market characterized by intense intermodal competition, a decision to unbundle could *never* be justified because such costs would be incurred without promoting *competition* in the market (as opposed to the welfare of individual competitors). *Id.* Nor could there be any conceivable basis for imposing an unbundling obligation on one and only one competitor in a competitive market.

In determining that it should not require incumbents to engage in line sharing, the Commission properly weighed the costs and benefits of unbundling in light of the relative competitive insignificance of DSL service provided using line-sharing arrangements. *Order* ¶ 263. Consumers have benefited greatly from the intense battle between DSL providers and cable modem providers to capture broadband market share in the mass market; by contrast, the Commission had before it no evidence – and the Coalition cites no credible evidence in its petition – that line sharing contributes to such competition. Thus, there is little if anything that can be placed on the benefit side of the ledger in the unbundling cost-benefit analysis.

By contrast, the competitive and administrative costs of requiring line sharing are well established in the *Order*. Most important, permitting line sharing stifles innovation and investment by competing providers of broadband service, which have been content simply to exploit the "irrational cost advantage" that they gain over competitors. *Id.* ¶ 260.[14] By declining to require line sharing, the Commission avoids discouraging "innovative arrangements between voice and data competitive LECs and greater product differentiation." *Id.* ¶ 261; *see id.* ¶ 263 (concluding that line sharing would discourage "the deployment of new technologies providing the mass market with even more broadband options").

[14] The Coalition's claims of puzzlement over the Commission's conclusion that line sharing provides them a cost advantage must be disingenuous. Unlike any other competitor, line-sharing competitive LECs gain access to the high-frequency portion of the local loop essentially for free. Nor is there any merit to the claim that such free access is "non-discriminatory." Incumbents must construct and maintain loops; having done so, they can use them for the services they wish to provide and that consumers wish to purchase. Line-sharing competitors simply demand free access to the incumbents' investment.

As the Commission recognized, the D.C. Circuit "cautioned the Commission against imposing the costs of unbundling if doing so would not bring on a *significant* enhancement of competition." *Id.* ¶ 256 n.760 (emphasis added). In determining that the costs of line sharing far outweigh any benefit, the Commission simply followed the court's clear mandate.

## III. THE COALITION HAS NOT DEMONSTRATED ANY THREAT OF IRREPARABLE HARM, AND THE BALANCE OF HARMS MILITATES STRONGLY AGAINST THE COALITION'S REQUESTED RELIEF

The Coalition is also unable to support its claims that the *Order* threatens its members with irreparable harm of the type that could justify a stay. Indeed, the claim that the *Order* threatens the Coalition's members with irreparable harm is not merely inconsistent with its members' public statements, but also ignores the undue generosity of the Commission's transitional rules. Moreover, to perpetuate the Commission's vacated line-sharing rules would inflict irreparable and significant harm on both incumbent LECs and the public interest.

Covad has gloated publicly that the "'FCC moves [in the *Order*] are a net positive for us.'" Yochi J. Dreazen, *FCC to Unveil Contentious Phone-Network Rules*, Wall St. J., Aug. 21, 2003, at B4. Covad's stock "soared 20 percent" after the release of the *Order* as Covad happily told its investors that the FCC's rules "would not . . . greatly affect[]" it, particularly because the rules were "'on balance better than what many anticipated.'" Reuters, *Covad Shares Surge 20 Percent After FCC Report*, Aug. 22, 2003. "'It's certainly better than what we could've had,'" Covad stated. IDG New Service, *DSL Providers Find Some Good News in FCC Order*, Aug. 22, 2003. The rules, Covad's CEO insisted, are "'a good thing.'" *Id.* In light of those positive public statements, the Coalition's claims that the *Order* causes them *harm* – let alone harm that is "certain and great" and "of such *imminence* that there is a 'clear and present' need for equitable relief" – is simply incredible. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (internal quotation marks omitted).

Covad's public glee at the terms of the *Order* is understandable in light of the Commission's transitional rules, which – far from ameliorating the negative consequences of the Commission's prior errors – guarantee Covad and others a windfall stretching out to 2006. As the D.C. Circuit ruled, and as the Commission itself now concedes, the Commission should never have imposed any line-sharing obligation in the first place. For years, companies like Covad and the other Coalition members have exploited the Commission's unlawful line-sharing rules to gain access to incumbents' property "at a price of roughly zero." In light of its determination, the Commission should have required the prompt elimination of line sharing and required requesting carriers to compensate incumbents for the use of their property. Far from doing so, however, the *Order* actually preserves existing line-sharing arrangements *without any additional compensation to the incumbent provider* for *three years*. Moreover, the *Order* goes so far as to permit incumbents to order *new* line-sharing arrangements – even though no lawful Commission order has *ever* required unbundled access to the high-frequency portion of the loop – for an additional year with only a token 25% payment during that first year.[15] For a minimal investment, competitors will be permitted to continue to demand that incumbents engage in line sharing for another year and avoid the true cost of providing service, even though the Commission announced the end of line sharing six months ago and the D.C. Circuit presaged its demise half a year before that. Far from posing an unjustified threat to their businesses, the transitional rules threaten merely to continue to prop up inefficient competitors.

Finally, the Coalition's suggestion that re-imposing line sharing – either directly or by eliminating payments for new line-sharing arrangements – would cause little harm to incumbents or the public interest is likewise untenable. Incumbents suffer from the unlawful expropriation

[15] Twenty-five percent of the recurring charge for the unbundled loop can be less than a dollar in some areas.

of their property for the benefit of private parties, loss of customers, and the unjustified and unlawful expense of maintaining a line-sharing infrastructure that should never have been created in the first place. *Those* harms would unquestionably accompany the re-imposition of line sharing and could never be adequately remedied. Indeed, the transitional rules as written already inflict such harms. And the Coalition's suggestion that the public interest benefits when the Commission persists in requiring incumbents to promote the competitive efforts of inefficient rivals ignores the sorry history of the telecommunications industry over the last seven years. The Commission has rightly determined that requiring line sharing distorts competition and squelches innovation without any corresponding benefit to consumers. Perpetuating such arrangements thus harms the public interest in a direct and significant way.

## CONCLUSION

The Coalition's members have already enjoyed a 15-month *de facto* stay of the May 24, 2002 vacatur of the 1999 line-sharing rules and are the beneficiaries of continued regulatory largesse under the Commission's transitional rules for another three years. Because the Coalition is unable to show any likelihood of success on the merits or any irreparable harm justifying a stay, the Commission should deny the petition.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of September 2003, I caused copies of the foregoing Joint Opposition to the Choice Coalition's Petition for Stay to be served upon the parties on the attached service list by hand (designated with an asterisk) or by first-class mail, postage prepaid.

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